85-1509

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

RAY E. VINTILLA, et al.,

Petitioners,

vs.

THE UNITED STATES STEEL CORPORATION PLAN FOR EMPLOYEE PENSION BENEFITS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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63PP

QUESTIONS PRESENTED

1. WHETHER THE HOLDING IN ALESSI V. RAYBESTOS-MANHATTAN, INC., 451 U.S. 504 (1981), WHICH PERMITTED THE INTEGRATION OF WORKERS' COMPENSATION AWARDS WITH PENSION BENEFITS UNDER ERISA, MAY BE INTERPRETED AS ALLOWING OFFSETS OF ALL OTHER SOURCES OF INCOME WITHOUT LIMITATION OR RESTRICTION.

2. WHERE THE LAW OF A FOREIGN STATE MANDATES THE PAYMENT OF AN EMPLOYEE BENEFIT DESIGNATED AS "CESANTIA" AND "ANTIGUEDADES" UPON TERMINATION OF EMPLOYMENT IN THAT COUNTRY AND PROVIDES THAT THE BENEFIT IS A VESTED RIGHT WHICH CANNOT BE FORFEITED WHATEVER THE LABOR RELATION, MAY SUCH A BENEFIT BE OFFSET AGAINST PENSION BENEFITS CONSISTENT WITH ERISA?

3. WHETHER A TOTAL DENIAL OF BENEFITS TO ELIGIBLE RETIREES DURING A PERIOD REQUIRED TO RECOVER THE "CESANTIA" AND "ANTIGUEDADES" AWARD CONSTITUTES A FORFEITURE UNDER THE ERISA SCHEME.

4. WHERE THE OFFSET AGAINST PENSION BENEFITS IS A KIND OF BENEFIT SPECIFICALLY DISAPPROVED BY THE INTERNAL REVENUE SERVICE, IS A PENSION RULE AUTHORIZING THE OFFSET LAWFUL UNDER ERISA?

5. WHETHER THE RECOVERY OF "CESANTIA" AND "ANTIGUEDADES" BENEFIT BY THE PENSION PLAN AS AN OFFSET AGAINST PENSION BENEFITS AMOUNTS TO AN ASSIGNMENT OR

ALIENATION OF PENSION BENEFITS PROHIBITED BY ERISA.

6. WHETHER PENSION FUNDS RECOVERED IN AN AMOUNT EQUAL TO THE "CESANTIA" AND "ANTIGUEDADES" AWARD BECOME ASSETS WHICH IMPROPERLY INURE TO THE BENEFIT OF THE COMPANY IN VIOLATION OF ERISA.

PARTIES TO PROCEEDING

The parties to this proceeding are the following: John P. Ayo, Henry Bakkila, John J. Belak, Charles G. Brink, Walter E. Brown, Nicholas M. Butler, Robert H. Campbell, John H. Curran, Loy T. Dixon, Henry M. Drane, James A. Driscoll, Wheeler W. Green, Wade H. Harrell, Edgar D. Hosmer, Jack Dibbe, Elizabeth A. Leaf, Robert S. Levings, Robert A. Mazur, Douglas H. Mitchell, Gordon R. Steiner, Anthony N. Valentine, Ray E. Vintilla, Donald E. Weeks, Alton G. Woody, Frederick W. Wright, and The United States Steel Corporation Plan for Employee Pension Benefits.

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The petitioners, Ray E. Vintilla, et al., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for

the Third Circuit entered in this proceeding on January 21, 1986.

OPINION BELOW

The opinion of the District Court for the Western District of Pennsylvania, which is reported in 606 F.Supp. 640 (1985), appears in the Appendix hereto. The Court of Appeals rendered no opinion.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on January 21, 1986. A timely petition for rehearing en banc was denied on February 20, 1986, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

> Section 1053(a).
>
> Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age....
>
> Section 1056(d)(1).
>
> Each pension shall provide that benefits provided under the plan may not be assigned or alienated.
>
> Section 1103(c)(1).
>
> ...[T]he assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

STATEMENT OF THE CASE

The plaintiffs in this proceeding and petitioners herein have brought this suit under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.,

Section 1001 et seq., pursuant to Section 502(a)(10(B), 29 U.S.C., Section 1132(a)(1)(B), for sums due them under the terms of their pension benefit plan. The jurisdiction of the court was invoked under 29 U.S.C., Section 1132(e)(1)(2).

The petitioners are former management employees of the Orinoco Mining Company in Venezuela (OMC), a subsidiary of the United States Steel Corporation. They are participants in the respondent United States Steel Corporation Plan for employee Pension Benefits (hereafter "the Plan"). Each of the petitioners is eligible to receive retirement benefits under the Plan. However, any pension to which they are entitled has been or is being denied them until the amount of "Cesantia" and "Antiguedades" ("C & A") monies paid to and received by

each of them, as hereinafter related, have been recovered[1].

The Plan is administered according to and governed by the United States Steel Non-Contributory Pension Rules. Paragraph 3.9 of the Pension Rules, as pertinent hereto, provides as follows:

> If any participant is or shall become entitled to or shall be paid any ...severance allowance or payment of similar kind (hereafter "severance allowance")...by reason of any law, then the total amount of severance allowance paid or payable to him shall be deducted from or charged against the amount determined in accordance with paragraphs 3.3(b), (c) and (d) and paragraphs 3.4 and 3.5....

The Plan is an "employee pension benefit plan" and "pension plan" within the

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[1] Benefits are being paid to retiree whose "C & A" payment has been fully recovered or voluntarily repaid.

meaning of ERISA, 29 U. S. C., Section 1002(3).

By virtue of the Labor Law of Venezuela, the petitioners, as employees of Orinoco Mining Company, were entitled to receive and were paid upon termination of their employment in Venezuela, monies known as "Cesantia" and "Antiguedades." The petitioners were entitled to these benefits as a result of their service in Venezuela. "Cesantia" was established and is defined by the Labor Law of Venezuela as a termination-of-employment benefit or unemployment aid, and "Antiguedades" as a payment in recognition of length of service, both payable upon termination of employment in Venezuela (hereafter "C & A"). Venezuelan law provided, at all times relevant herein, that "C & A" be a vested right

which cannot be forfeited, whatever the labor relation.

In 1974 Orinoco Mining Company was nationalized and appropriated by the Government of Venezuela. Many employees of U. S. Steel who were terminated in Venezuela due to nationalization of its subsidiary, Orinoco Mining Company, were not eligible for a pension and were not rehired by U. S. Steel. As a result, Venezuelan Labor Law required Orinoco Mining Company to establish individual trust accounts of the termination benefits accrued before April 25, 1975, which were declared as vested rights by Decree 124, dated May 31, 1974.

Following nationalization, certain Technical Assistance Agreements were entered into annually between U. S. Steel Corporation and Venezuela through its state-owned company known as CVG Ferrominera Orinoco CA.

The initial agreement was executed in December, 1974. Generally, these agreements provided for the use of Orinoco Mining Company's American personnel to aid and assist the Venezuelan company in its operations during a transiticnal period. In consideration of the services of U.S. Steel employees[2], Venezuela agreed to reimburse U.S. Steel for all payroll costs related to the American personnel, including, among other things, "social benefits" incurred by U.S. Steel. The "social benefits" encompassed the "Cesantia" and "Antiguedades" which U.S. Steel was required by Venezuelan law to pay its employees. In addition to the reimbursement for the payroll costs

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[2]Seventeen of the petitioners were transition employees.

and social benefits[3], Venezuela was compelled by the agreement to pay U.S. Steel a fee of 200% and subsequently of 100% over and above the reimbursement costs and fees hereinabove described.

The petitioners filed the complaint as a class action on November 21, 1981, in the United States District Court for the Northern District of Ohio, alleging that the defendant U.S. Steel and The United States Steel Corporation Plan for Employees Pension Benefits ("Plan") wrongfully denied them pension benefits to which they are entitled, in violation of ERISA. The defendant, U.S. Steel, filed a motion to dismiss on the ground that it is not a proper party to the action. Simultaneously therewith, the Plan

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[3]U.S. Steel was reimbursed for the "C & A" monies paid to the transitional employees.

moved the court to dismiss the action because of improper venue, or, in the alternative, to transfer the case to the United States District Court for the Western District of Pennsylvania. The District Court found that U.S. Steel is not a proper party to the suit and granted the motion to dismiss. The court also found that venue is improper as to the Plan, and transferred the case to the District Court for the Western District of Pennsylvania.

The parties stipulated that the motion to proceed as a class action is to be dismissed and that the action will go forward in the name of all persons employed by Orinoco Mining Company who are eligible for pension benefits under the Plan and whose benefits have been withheld pending the recovery of the "C & A" benefits. The list

of such plaintiffs has been filed with the court.

The suit seeks the invalidation of paragraph 3.9 of the Plan pension rules, a permanent injunction enjoining the withholding of the pension benefits and the recovery of the benefits which have been withheld. The matter was submitted to the District Court on motions for summary judgment by the respective parties pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The District Court denied the petitioners' motion, granted the respondent's motion for summary judgment, and entered judgment accordingly. The court held, in short, that although ERISA offers little direct guidance for determining the permissibility of offsets, the congressional and administrative understanding of offsets with the court's construction of the

non-forfeiture provision of ERISA in Alessi, justifies the conclusion that ERISA is not contravened in the instant case (see Appendix).

The Court of Appeals affirmed the decision of the District Court summarily and without opinion.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT IN ALESSI V. RAYBESTOS-MANHATTAN, INC., 451 U.S. 504 (1981), AND VIOLATES THE PROTECTIVE PROVISIONS OF ERISA.

Inasmuch as the Court of Appeals did not render an opinion in affirming the decision below, the petitioners' arguments, of necessity, are directed to the decision of the District Court.

In reliance upon what it conceived to be the principles enunciated by this Court

in Alessi regarding the integration of funds from other sources with retirement benefits, the District Court validated the respondent's action in withholding the petitioners' pension benefits until the "C & A" payment has been fully recovered or voluntarily repaid.

This case deals with the question whether the unique benefit known as "Cesantia" and "Antiguedades," mandated by the Labor Law of Venezuela, is forfeitable under the protective provisions of ERISA. The question involves the validity of the respondent's pension rule which authorizes the withholding of petitioners' pension benefits until the amount of "C & A" payment received by them has been fully recovered. The issue is a statutory one: whether the petitioners' benefits under the Plan are "nonforfeitable"

within the meaning of Section 203(a) of ERISA, 29 U.S.C., Section 1053(a).

ERISA was passed after Congressional investigations indicated that regulation was necessary in order to curb abuses of private retirement pension plans. The Act is a remedial statute enacted to protect the beneficiaries of retirement plans by reducing the risk of loss of pension rights. The language of ERISA and its legislative history caused this Court to conclude "that Congress through ERISA wanted to ensure that 'if a worker has been promised a defined pension benefit upon retirement - and if he has fulfilled whatever conditions are required to obtain a vested benefit - he actually receives it.'" Alessi, 510, quoting Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 375 (1980).

Clearly vested benefits may not be forfeited except as provided by Section 203 ERISA, 29 U.S.C., 1053. Congress sharply limited the situations in which vested rights can be divested. With limited exceptions noted[4], "...no rights, once they are required to be vested, may be lost by the employee under any circumstance. . .." H.R. Rep.No. 93-807, 93rd Congress, 2d Sess. 60 (1974)(underscoring supplied).

It is agreed that the petitioners are entitled to normal retirement benefits provided by the respondent, and that they have not received and are not receiving such benefits because of respondent's Pension

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[4]The limited exceptions in which pension rights can be divested, as set forth in Section 203, 29 U.S.C., Section 1053(a)(3), are not applicable here.

Rules, Paragraph 3.9[5].

This Court, in Alessi, stated that retirement benefits could be calculated by integrating funds available from other sources, such as workers' compensation awards. However, a careful reading of the decision readily establishes that the Court appeared to limit the applicability of this broad statement to the situation where the Internal Revenue Service allowed the reduction of pension benefits. Alessi reviewed the criteria employed by the IRS in determining whether to allow the integration of pension payments with funds available from other sources, and found that the IRS had specifically authorized the offset in

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[5]Pension benefits are being paid to retirees whose "C & A" monies have been voluntarily repaid by them or fully recovered by the company through offsets.

question - workers' compensation awards. Thus, the Court concluded that since the IRS had approved the reduction in pension benefits by workers' compensation awards prior to ERISA, Congress embraced such IRS rulings and by implication permitted integration along the lines already approved by the IRS. As a result thereof, the Court deferred to the legislative authority of Congress in allowing the workers' compensation offset, saying in connection therewith, "Our judicial function is not to second-guess the policy decisions of the legislature, no matter how appealing we may find the contrary rationales." Alessi, p. 521.

The Alessi employer merely reduced the amount which had vested in the pensioners by the amount of workers' compensation paid to them, but did not eliminate or withhold any payments while the workers' compensation

benefits were being paid. In the instant case, the petitioners are eligible and entitled to pension benefits, but they are not receiving any benefits at all. And they will not be paid any retirement benefits during the entitlement period until the Plan has recovered the "C & A" award in full. This period during which the petitioners are being denied pension benefits may, on the average, extend to 15 years.

According to Alessi, as petitioners read the decision, unless the integration of the particular benefit is specifically authorized by ERISA, such as Social Security and Railroad Retirement, or is explicitly allowed by other Congressional enactments, such as are found in the Internal Revenue Code and its interpretation by the Treasury Regulations, the offset amounts to a forfeiture of pension rights.

It is clear that ERISA does not permit, either explicitly or implicitly, the withholding of petitioners' pension benefits until "C & A" payments have been fully recovered. And there is no express provision in ERISA sanctioning the integration of the analogous benefit known as severance pay. Therefore, in view of the stringent proscriptions against forfeiture of vested rights which Congress incorporated in Section 203 of ERISA, 29 U.S.C., Section 1053, the justification for the withholding of benefits in the instant case must be found in an express ruling of the IRS, such as occurred in Alessi. Though Alessi stated that the reduction of pension benefits is not per se prohibited by Section 1053(a), it does not follow, as held by the District Court and affirmed by the Circuit Court, that the practice of integration is unlimited

or unrestricted. According to Alessi, in order for the reduction to be permissible, Congress must have acknowledged and accepted the practice.

The "Cesantia" and "Antiguedades" payment was mandated by Venezuelan law. The payment was made only to U.S. Steel's "OMC" employees, and was paid in one lump sum at the time of termination as an unemployment assistance and a reward for service. It is significant that Venezuela has created these benefits as vested rights and has expressly provided that they may not be forfeited, whatever the labor relation may be.

The pension rule provision being challenged refers to the benefits withheld herein as a "severance allowance or payment of similar kind." Whether the benefit is considered for our purposes herein as that defined by Venezuelan law, or generally as

a severance allowance, the label is legally inconsequential. It is the substance of the benefit which determines whether it is a benefit that may be withheld from retirement benefits due and payable to the petitioners.

In Gilbert, et al., v. Roberts, (Docket Nos. 84-7824, 84-7908, 84-7914, 2d Cir-1985), one of the issues before the court was whether a severance pay policy of the company constituted an employee welfare benefit plan under Section 3 of ERISA, 29 U.S.C, Section 1002(1). The observations of the Second Circuit regarding the nature of severance pay are especially relevant and enlightening. The court remarked (p. 4620):

> Although severance pay is often a reward for past service, it also serves the same purpose as unemployment benefits. When ties that bind an employee to his or her company are severed by the employer, unemployment for the employee - whether fleeting or permanent - is an inexorable consequence.

> Thus, in our view severance pay is an unemployment benefit.
> (Underscoring supplied.)

Alessi acknowledged that "the IRS has disapproved integration with unemployment compensation...," stating that "as a payment for temporary lay-offs, it too [unemployment compensation] is a kind of benefit not comparable to any permitted in a qualified pension plan." Thus, it is clear and indisputable, that "C & A," being an unemployment benefit, "is [also] a kind of benefit not comparable to any permitted in a qualified pension plan." Alessi, p. 521.

There is no Congressional authority for the offset of "C & A" payments, either in ERISA or any Congressional enactments, as was found in Alessi for the workers' compensation offset. On the contrary, "C & A," as an unemployment benefit, is

specifically excluded as an offset by ERISA and the IRS.

The correctness of the decision below is open to serious question. ERISA was enacted to provide protection for the individual's pension rights so that anticipated benefits could become real rather than illusory. It was because of pension plan abuses that Congress deemed it necessary to provide assurances to the pensioners by the enactment of ERISA. The Act represents Congress's reaction to the misuse associated with the then-existing plans. The pension rule in issue was inserted ex parte in the pension plan many years before ERISA, and was never modified thereafter. The application of the challenged pension rule to the petitioners' pension rights amounts to a complete denial of any pension benefits to the retirees under the Non-Contributory Plan.

Many years must elapse before complete recovery of "C & A" from the pension benefits is accomplished. As a result, the retirees in many instances may not survive the recovery period, and, therefore, will not receive any of the pension benefits to which they were entitled at the time of and during retirement.

Congress coupled ERISA's nonforfeitability provision with a section barring assignment of vested pension benefits: "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C., Section 1045(d). In addition, the regulation that the Internal Revenue Service promulgated pursuant to ERISA states "that benefits provided under the plan may not be...assigned...alienated or subject to attachment or garnishment, levy, execution or other

legal or equitable process." 1 FTR, Section 1.401(a)(13)(b)(1), 1980. Taken together, these provisions prohibit both the voluntary and involuntary assignment of vested pensions. Cody v. Riecker, 454 F.Supp.22, 24 (EDNY) 1978), aff'd 594 F.2d 314 (2 Cir. 1979).

The terms "assignment" and "alienation" include any arrangement providing for the payment to the employer of plan benefits which otherwise would be due the participant under the plan, and any direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant a right or interest enforceable against the plan, in or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary (1978 P-H Inc. Pension, Paragraph 85, 180).

The legislative history of ERISA in the committee reports prepared during congressional consideration of the statute contains the following reference relevant hereto:

> (b) Alienation. To further ensure that the employee's accrued benefits are actually available for retirement purposes, the committee bill also contains a provision requiring the plan to provide that benefits may not be assigned or alienated.
>
> House & Senate Conf. Comm.,Cong.Rep. on H.R. 2, Pension Reform, H.R. Rep. No. 93-1280, 93rd Cong., 2d Sess. 3, reprinted in [1974] U.S. Code Cong. & Admin. News 5038, 5061.

The inescapable conclusion to be drawn from a reading of both the language of Sections 206(d) and 401(a)(13) of ERISA and the totality of the legislative history is that the assignment-alienation prohibition extends to the involuntary assignment of the pension rights effectuated by the Plan to recover the "C & A" payments paid pursuant

to Venezuelan law. The legislative history and policies underlying ERISA emphasize that the aim of the prohibition is "to protect covered employees and their beneficiaries" and "[t]o further ensure that the employee's accrued benefits are actually available for retirement purposes...." To allow the respondent to suspend the payment of retirement benefits to the plaintiffs as beneficiaries of the pension plan until it exhausts the total amount of "C & A" monies would totally destroy the complex structure Congress created to protect these very benefits. The argument that paragraph 3.9 of the pension rules authorizes assignment of the pension in order to recover the Venezuela termination benefits, likewise would emasculate the regulatory scheme imposed by ERISA. It is clear that in refusing to make pension payments to the petitioners the Plan

has employed a species of forfeiture or of involuntary assignment of the petitioners' benefits back to the pension fund. ERISA's nonforfeitability and nonassignability provisions clearly prohibit such a practice as this.

Section 403(c)(1) of ERISA, 29 U.S.C., Section 1102(c)(1), states, "...the assets of a plan shall never inure to the benefit of any employer, and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries...." This language must be read as a prohibition against the recoupment of the "C & A" payments by U.S. Steel.

The recovery of the "C & A" monies in the instant case constitutes a "windfall" to U.S. Steel. The payment of "C & A" to the Venezuelan employees of U.S. Steel's Orinoco Mining Company was but a "payroll

cost" of operations. These monies have been recovered in the first instance as a normal business expense. As a result of the Technical Assistance Agreement between U. S. Steel and Venezuela, following the nationalization of U. S. Steel's operations in that country in 1974, the latter was reimbursed not only for all its payroll expenses, which included "C & A" payments to its post-nationalization employees[6], but it also received additional remuneration of 200% and 100% over and above the actual expenses incurred in connection therewith.

The conclusion is inescapable that U.S. Steel engaged in "double dipping" with regard to the recoupment of the "C & A"

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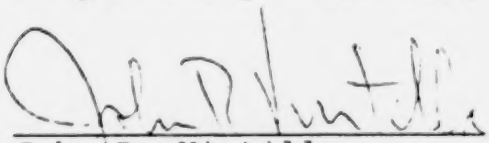
[6]By reason of the Technical Assistance Agreement, U.S. Steel was reimbursed, among other things, for the "C & A" monies paid to 17 of the petitioners and others who have not joined in this action.

monies from the petitioners. First, it received multiple remunerations from Venezuela for the "C & A" payments to its American employees, and second, it recovered and is recovering these same monies from the petitioners in connection with the pension benefits due and owing to them. It must be emphasized that the payment of "C & A" to the petitioners did not originate with or through the generosity of U. S. Steel. The payments were required to be paid by the Labor Law of Venezuela. These payments, which were considered a payroll cost, could hardly have been within the contemplation of U. S. Steel in 1950, as being integrated with the pension plan.

CONCLUSION

For the reason set forth above, a writ of certiorari should issue to review the judgment of the Third Circuit.

Respectfully submitted,



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February 28, 1986.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 85-3280

RAY E. VINTILLA, et al.,

Appellants,

v.

UNITED STATES STEEL
CORPORATION PLAN FOR
EMPLOYEE PENSION BENEFITS,

Appellees.

Appeal from the United States District Court for the Western District of Pennsylvania.

(D.C. No. 83-1034)
District Judge: Honorable Gerald J. Weber

Submitted under Third Circuit Rule 12(b)
Tuesday, January 7, 1986

BEFORE: GARTH and STAPLETON, Circuit Judges and BISSELL, District Judge*

JUDGMENT ORDER

After consideration of the contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district be and is hereby affirmed.

Costs taxed against appellants.

By the Court,

/s/
Circuit Judge

ATTEST:

/s/
Sally Mrvos, Clerk

DATED: January 21, 1986

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*Honorable John W. Bissell, United States District Judge for the District of New Jersey, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 85-3280

RAY E. VINTILLA, et al.,

Appellants,

v.

UNITED STATES STEEL
CORPORATION PLAN FOR
EMPLOYEE PENSION BENEFITS,

Appellees.

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, Circuit Judges, and BISSELL, District Judge*

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*Honorable John W. Bissell, United States District Judge for the District of New Jersey, sitting by designation.

The petition for rehearing filed by appellants, John P. Ayo; Henry Bakkila; John J. Belak; Charles G. Brink; Walter E. Brown; Nicholas M. Butler; Robert H. Campbell; John H. Curran; Loy T. Dixon; Henry M. Drane; James A. Driscoll; Wheeler W. Green; Wade H. Harrell; Edgar D. Hosmer; Jack Kibbe; Elizabeth A. Leaf; Robert S. Levings, Robert A. Mazur; Douglas H. Mitchell; Gordon R. Steiner; Anthony N. Valentine; Ray E. Vintilla; Donald E. Weeks; Alton G. Woody; and Frederick W. Wright, in the above-entitled case having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having

voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

DATED: February 20, 1986

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RAY E. VINTILLA, et al., Plaintiffs,	)	
vs.	)	
THE UNITED STATES STEEL CORPORATION PLAN FOR EMPLOYEE PENSION BENEFITS, Defendant.	)	Civil Action No. 83-1034

ORDER

The parties have stipulated to the relevant facts and filed fully-briefed cross motions for summary judgment based on the stipulation. Having considered these materials, the Motion of the Plaintiffs is DENIED, and the Motion of Defendant is GRANTED, and JUDGMENT is hereby ENTERED for the Defendant in accordance with the accompanying opinion.

ORDERED filed this 18th day of April, 1985.

/s/ Gerald J. Weber
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RAY E. VINTILLA, et al., Plaintiffs,	)	
vs.	)	
THE UNITED STATES STEEL CORPORATION PLAN FOR EMPLOYEE PENSION BENEFITS, Defendant.	)	Civil Action No. 83-1034

O P I N I O N

WEBER, D.J.

Plaintiffs have brought an action under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C., Section 1001 et seq. to recover pension benefits they claim defendant is wrongfully withholding. Defendant [1] admits withholding the full amounts in

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[1] Plaintiffs originally filed their complaint in the United States District Court for the Northern District of Ohio. The complaint named both the present defendant and United States Steel Corporation as defendants. In an opinion filed May 4, 1983, Judge Krenzler dismissed U. S. Steel Corporation from the suit and transferred it to this court.

question, but responds that ERISA does not prohibit its actions. Both sides have moved for summary judgment. At the outset, we find this case well-suited for summary judgment. The parties have agreed to the relevant facts by stipulation, which presents us with one question: whether defendant's refusal to pay these pension benefits constitutes a "forfeiture" in violation of ERISA.

I. FACTS

Plaintiffs are 25 former management employees of U.S. Steel Corporation who worked for various lengths of time in the company's Venezuelan mining subsidiary, Orinoco Mining Company ("Orinoco"). The evidence indicates that those employees received salaries and benefits similar to those of their counterparts in other foreign countries and the United States. In

addition, according to Venezuelan law, all workers in Venezuela are entitled to certain benefits in excess of what might be considered typical compensation in the United States. Two such benefits are payments for "cesantia" and "antiguedades." Roughly translated, the terms mean "unemployment aid" and "payment for years of service," respectively (referred to collectively as "severance benefits"). These severance benefits consisted of a month's salary multiplied by total years of service, paid in lump sum to all employees upon separation from the company. See Defendant's Appendix to Motion for Summary Judgment, Exhibit F. U. S. Steel Corporation was the sole contributor to the trust from which payments were drawn. The company ultimately paid about $4,000,000 in severance benefits to its Orinoco employees pursuant to Venezuelan

law. Several plaintiffs received lump sum payments of more than $200,000. See Plaintiffs' Appendix to Motion for Summary Judgment at 17 and 20.

In 1974, Venezuela took steps to nationalize Orinoco Mining Company. U. S. Steel agreed to provide technical assistance to the new state-owned company during the transition. Following this transition, U.S. Steel would have no part in ownership or management of the new company. Anticipating the resulting transfer or retirement of all employees in Venezuela, U. S. Steel offered them a plan providing for various options in receiving severance benefits. See id. at 21-24. The choice of lump sum payments -- the choice made by plaintiffs -- triggered a provision in the company's pension plan that lies at the heart of this dispute. Section 3.9(a) of the plan provided that

severance benefits would be deducted, or set off, from the non-contributory pension U.S. Steel employees normally would receive. Some plaintiffs who received large severance payments complain that defendant's recovery by setoff will preclude them from collecting any non-contributory benefits until the mid-1990's.

The parties do not dispute the existence or the effect of the pension plan provision authorizing defendant to set off severance benefits against pension payments. Copies of the 1976 and 1977 U.S. Steel pension plan filed with the court both provide in section 3.9(a) that:

> If any participant is or shall become entitled to or shall be paid any discharge, liquidation or dismissal or severance allowance or payment of similar kind...under any policy of any of the Employing Companies...or by reason of any law, then the total amount of such severance allowance paid or

> payable to him shall be deducted from or charged against the amount determined in accordance with paragraphs 3.3(b), (c) and (d) and paragraphs 3.4 and 3.5 [these paragraphs contain the Plan's formula for calculating the amount of pension payments].

The parties have stipulated that section 3.9(a) applied at all relevant times and that "plaintiffs were aware than any pension ultimately received from the Plan would be calculated including a deduction for any antiguedades and cesantia received from [Orinoco] in accordance with the published policies of [Orinoco] and the Non-Contributory Pension Rules of the Plan." Stipulation, paragraphs 10 and 12. The remaining question is whether this deduction is permissible under ERISA.

II. THE SUPREME COURT'S CONSTRUCTION OF 29 U.S.C. SECTION 1053

Plaintiffs bring their action under 29 U.S.C., Section 1132(a) which authorizes

civil enforcement of claims for pension benefits[2]. They contend that defendant's refusal to pay their vested benefits constitutes a forfeiture in violation of 29 U.S.C. Section 1053. Section 1053 states simply that "Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age.[3]

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[2]Section 1132(a) states that "A civil action may be brought -- (1) by a participant or beneficiary -- ...(B) to recover benefits due to him under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

[3]ERISA's definitional section, 29 U.S.C., Section 1002(19) provides that:

> The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally

(f.n. 3 cont'd. next page.)

The United States Supreme Court faced this issue in Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1980), which we have no doubt controls our decision in this case. The chief difference between Alessi and the case at bar is the type of income set off against pension benefits. In Alessi, the

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3 (cont'd.)

> enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title. Section 1053(a)(3)(A) through (D) expressly permits four types of setoffs. It is not a forfeiture when setoffs: (1) are contingent upon the employee's death; (2) occur when the employee accepts the job under certain circumstances; (3) are due to some retroactive amendments to a pension plan; or (4) result from withdrawals of benefits obtained through mandatory contributions.
>
> None of these exceptions applies here.

set off involved workers' compensation. We must determine by the same analysis whether ERISA prohibits this setoff which stems from Venezuelan labor law.

The plaintiffs in Alessi were retired employees who had obtained workers' compensation awards. The administrators of their pension plan reduced their retirement benefits by the amount of this compensation. The retirees argued that they were being denied vested benefits in violation of 29 U.S.C. Section 1053. In defining the issue at stake, the Court made a fundamental distinction which we believe controls the case at bar. Section 1053 unmistakably protects an employee's right to his vested pension benefits. On the other hand, ERISA exerts little control over the content of the benefits themselves. The parties to the pension plan are responsible for deciding the actual

benefits available under the plan. As the Court stated in Alessi:

> The statutory definition of "nonforfeitable" assures that an employee's claim to the protected benefit is legally enforceable, but it does not guarantee a particular amount or a method for calculating the benefit. As we explained last Term, "it is the claim to the benefit, rather than the benefit itself, that must be 'unconditional' and 'legally enforceable against the plan.'"
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> 451 U.S. at 512 (quoting Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 372-73 (1980).

The Court thus held that it is permissible under ERISA for a pension plan to set off workers' compansation against expected retirement benefits. In so doing, the Court established that section 1053 is not a sweeping assurance against all setoffs to pension benefits.

III. PERMISSIBILITY OF INTEGRATION.

The general practice of setoffs against pension payments is known as "integration," "a calculation practice under which benefit levels are determined by combining pension funds with other income streams available to the retired employee." Alessi, 451 U.S. at 514. Integration is a method of stretching pension funds while insuring that a recipient's overall income is not reduced. Individual employees' retirement income will be less when integration is applied, as plaintiffs here object. The group of pension recipients under the plan, however, gains an advantage: the more outside income available to plan beneficiaries, the more pension money may be saved by setoff, within limits. This savings would permit the fund to pay a higher average pension.

The Treasury and Congress have consistently upheld integration. The Internal Revenue Service issued Revenue Rulings prior to enactment of ERISA approving setoff of workers' compensation against pension payments. See, e.g. Rev.Rul. 69-421, 1969-2 C.B. 72; Rev.Rul. 68-243, 1968-1 C.B. 157. In addition, the Treasury promulgated a regulation that interprets 26 U.S.C, Section 411, the Internal Revenue Code's parallel to 29 U.S.C. Section 1053(a), ERISA's nonforfeiture provision. The regulation endorses integration in stating that:

> [N]onforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits.
> 26 C.F.R. Section 1.411(a)-4(a) (1983).

Furthermore, in enacting ERISA, Congress considered, but did not prohibit, integration. On the contrary, Congress expressly permitted integration of social security and railroad retirement benefits. 29 U.S.C. Sections 1054(b)(1)(B)(iv), 1054(b)(1)(C), and 1054(b)(1)(G); 42 U.S.C. Section 401 et seq. and 45 U.S.C. Section 231 et seq. Finally, we are also bound by the rulings made by the Supreme Court in Alessi, which considered all the evidence above.

Plaintiffs argue that the claim made in Alessi is distinguishable from theirs because their non-contributory pension payments are being withheld entirely. In Alessi the setoff amounted to only a portion of the retirees' benefit payments; the retirees simply received a reduced amount. Plaintiffs assert that when a setoff is entire, rather than partial, it is transformed

into a forfeiture. This argument carries little weight. The amount of setoff is merely a function of the amount to be recouped and the length of time necessary to recoup, both of which will vary from case to case. These facts have little bearing on the legal issue of permissible setoffs under ERISA.

We hold that the Plan did not violate ERISA in setting off plaintiffs' severance benefits against their non-contributory pension payments. Under Alessi, we must reject plaintiffs' only argument of substance, that this setoff is a forfeiture under 1053(a). The Alessi holding itself leads us to conclude that section 1053(a) does not operate as a general bar to setoffs. Furthermore, we believe that policy reasons expressed by the court in Alessi, as well as those brought into play under the facts of our

case, justify defendant's actions.

First, as described above, the group of beneficiaries under plaintiffs' pension plan benefits from any savings in fund outlays. Integration is a practical method of extending fund resources while maintaining a consistent or increasing level of payments among recipients. Second, we must acknowledge that U. S. Steel was the sole contributor to both the pension fund and the fund from which severance payments were drawn. In this setoff of severance payments, we thus find an example of an employer regulating access to retirement benefits using a formula recognized by both parties -- section 3.9(a) of the pension plan.

As the Alessi opinion makes clear, Congress did not expressly restrict all setoffs of pension benefits under ERISA. 451 U.S. at 511-12. Instead, the Court

recognized that Congress gave parties to pension plans wide latitude in choosing the content of their retirement benefits. An option to these plans might be setoff of other income. From plaintiffs' perspective, they are losing benefits which have already been calculated and are now due. They overlook the fact, however, that deduction of their severance benefits is itself part of the formula for determining the amount of their pension payments. That is, under the terms of the plan, the amount of pension to which plaintiffs are entitled is not fixed until the setoff is made.

This case appears to fall within the scope of actions that an employer would take in defining the contents of a benefit plan, on which ERISA has little bearing. Plaintiffs argue that their severance benefits have nothing to do with their pension; the

severance payments actually were compensation for the hardships of working in Venezuela. We do not question the difficulties of working in foreign countries. This argument is contradicted, however, by plaintiffs' stipulation that they knew their severance benefits would be deducted from their pension payments. Stipulation at 4. The set-off was not capricious. It is easily seen as part of the internal design of the plan itself. Ultimately, we find it persuasive that the employer made all the contributions to both the pension trust and the trust for severance benefits. We consider this adjustment between strictly employer-funded benefits less infringing than that of a pension fund setting off unrelated outside income such as social security benefits or worker's compensation.

Having decided that defendant's actions

are not outside the law, we are also satisfied that the setoff formula is intended to protect legitimate interests. In this case of a multinational corporation, integration is necessary to insure fairness to all employees in the administration of pension funds, few of whom receive such generous protection from foreign labor laws. Integration also helps control the cost of pension plans. We recognize that its application has limits. Nevertheless, it is a useful tool for encouraging private plans, making them more widely available, and for stabilizing or improving present plans.

CONCLUSION

We have little direct guidance for determining the permissibility of setoffs under ERISA. But plaintiffs' suit relies solely on Section 1053, which itself is

ambiguous as a basis for their cause of action. When we combine congressional and administrative understanding of setoffs with the Supreme Court's construction of section 1053 in the critical Alessi opinion, we find that ERISA does not prohibit this setoff. We will issue an order consistent with the foregoing opinion.